

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE IDAHO GROUND ) Docket No: CM-MP-2009-006  
WATER APPROPRIATORS, INC.'S )  
MITIGATION PLAN FOR CONVERSIONS, ) **ORDER APPROVING**  
DRY-UPS, AND RECHARGE ) **MITIGATION CREDITS**  
 ) **REGARDING SWC**  
 ) **DELIVERY CALL**  
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**FINDINGS OF FACT**

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Director of the Department of Water Resources (“Director” or “Department”) a *Mitigation Plan for Conversions, Dry-Ups and Recharge* (“Plan”) in accordance with the Conjunctive Management Rules (“CM Rules”). IDAPA 37.03.11.043. The Plan was filed broadly, “on behalf of [IGWA’s] Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities . . . .” *Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA’s Plan was published. The Plan was not protested. On May 14, 2010, the Director approved the Plan. *Order Approving Mitigation Plan*. In the Order Approving Mitigation Plan, the Director stated: “In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.”

3. On May 12, 2010, the Department received *IGWA’s Request for Mitigation Credit* (“Credit Request”). The Credit Request was filed in order to provide IGWA with mitigation credit for material injury that was predicted by the Director to occur to certain members of the SWC during the 2010 irrigation season. The Credit Request seeks approximately 15,306 acre-feet of mitigation credit for conversions, CREP, and recharge activities. According to the Request, these activities “enhance the water supply in the ESPA and to the Snake River . . . .” *Request* at 2.

4. Using the ESPA Model, the Director is able to simulate the benefits that will accrue to the Near Blackfoot and Minidoka gage during the 2010 irrigation season, in acre-feet, for certain mitigation activities:<sup>1</sup>

W.D. 130 Conversions	CREP	2007 & 2009 Recharge	Total
220	5,390	97	5,707

5. Because water should be provided during the time in which it can be put to beneficial use, which for the SWC is the irrigation season (April through October), the Director calculates transient mitigation credit for these activities. Attached hereto as Attachment A are the ESPA Model runs.

### CONCLUSIONS OF LAW

1. Idaho Code § 42-602 states that, “The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine.” The Idaho Supreme Court has recently stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

2. CM Rule 43.03 states as follows:

**03. Factors to Be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or

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<sup>1</sup> While IGWA has sought credit for certain activities undertaken by Southwest Irrigation District (“SWID”), IGWA has not stated that its Plan applies to SWID. Therefore, the Department will only review IGWA activities.

other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

3. The Credit Request requires the Director to utilize the ESPA Model to simulate the benefits that will accrue to the Near Blackfoot and Minidoka gage. CM Rule 43.03.e and .f. The ESPA Model represents the best available science for determining the effects of ground water diversions and surface water users on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There is currently no other technical basis as reliable as the simulations from the ESPA Model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. The degree of uncertainty associated with application of the ESPA Model is 10 percent.

4. In order to ensure that mitigation credit is provided during the time of need, which for the SWC is the irrigation season (April through October), the Director calculates transient mitigation credit for the above-identified mitigation activities. Based upon ESPA Model simulations, the Director determines that, for the 2010 irrigation season, the benefit of these activities will increase gains in the Near Blackfoot and Minidoka gage by 5,707 acre-feet.

### **ORDER**

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

IGWA's *Request for Mitigation Credit* is GRANTED for the 2010 irrigation season, in response to the SWC delivery call. The mitigation credit for the 2010 irrigation season is 5,707 acre-feet.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the issuance of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that, unless the parties specifically instruct the Director that a hearing is not necessary, a hearing shall occur on June 1, 2010. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an

appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 17<sup>th</sup> day of May, 2010.

  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 17<sup>th</sup> day of May, 2010.

<p>John K. Simpson BARKER ROSHOLT &amp; SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson Paul L. Arrington BARKER ROSHOLT &amp; SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>

<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  1961 Stout Street, 8<sup>th</sup> Floor  Denver, CO 80294  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Sarah A. Klahn  Mitra Pemberton  WHITE JANKOWSKI  511 16<sup>th</sup> St., Ste. 500  Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Dean A. Tranmer  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>William A. Parsons  Parsons, Smith &amp; Stone, LLP  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer  Jeffrey C. Fereday  GIVENS PURSLEY LLP  P.O. Box 2720  Boise, ID 83701-2720  <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a>  <a href="mailto:jcf@givenspursley.com">jcf@givenspursley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank  IDWR—Eastern Region  900 N. Skyline Drive  Idaho Falls, ID 83402-6105  <a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

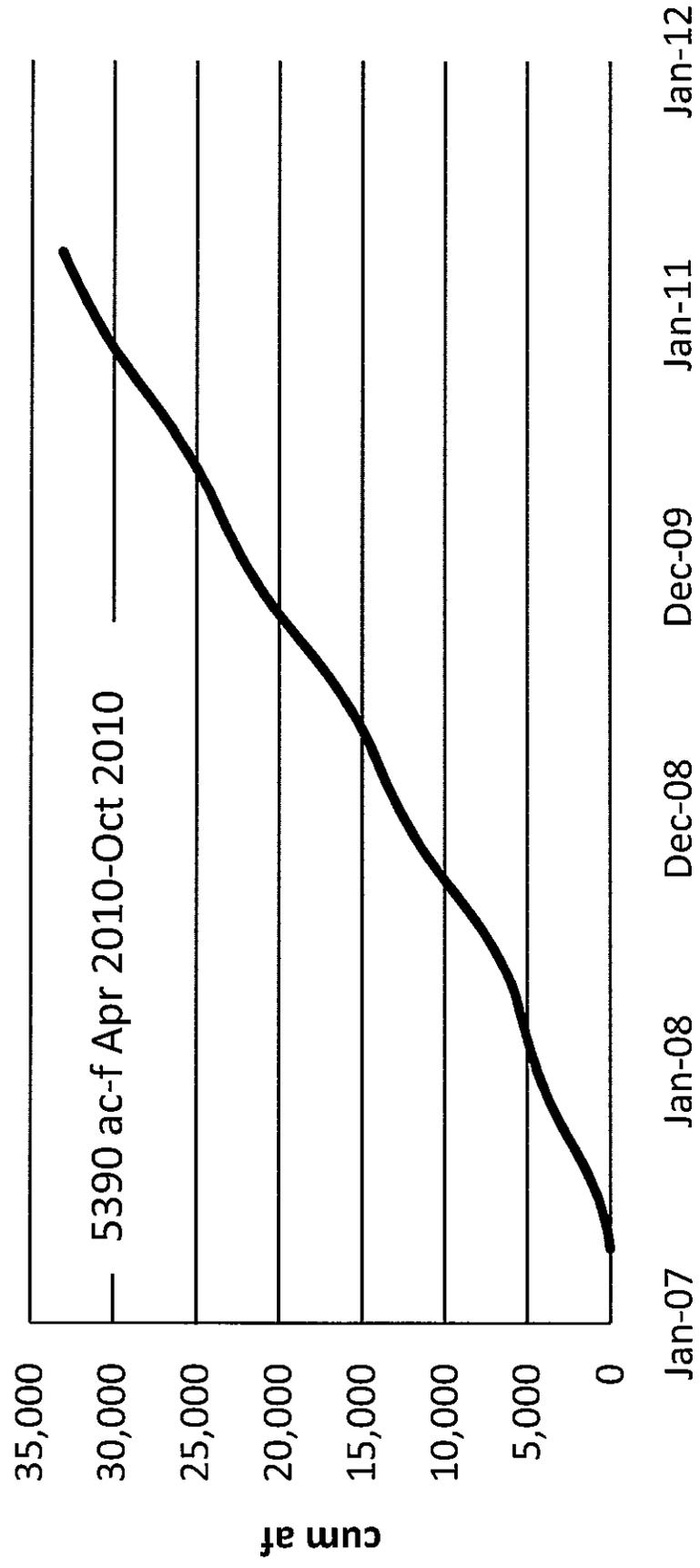
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:allen.merritt@idwr.idaho.gov">allen.merritt@idwr.idaho.gov</a> <a href="mailto:cindy.yenter@idwr.idaho.gov">cindy.yenter@idwr.idaho.gov</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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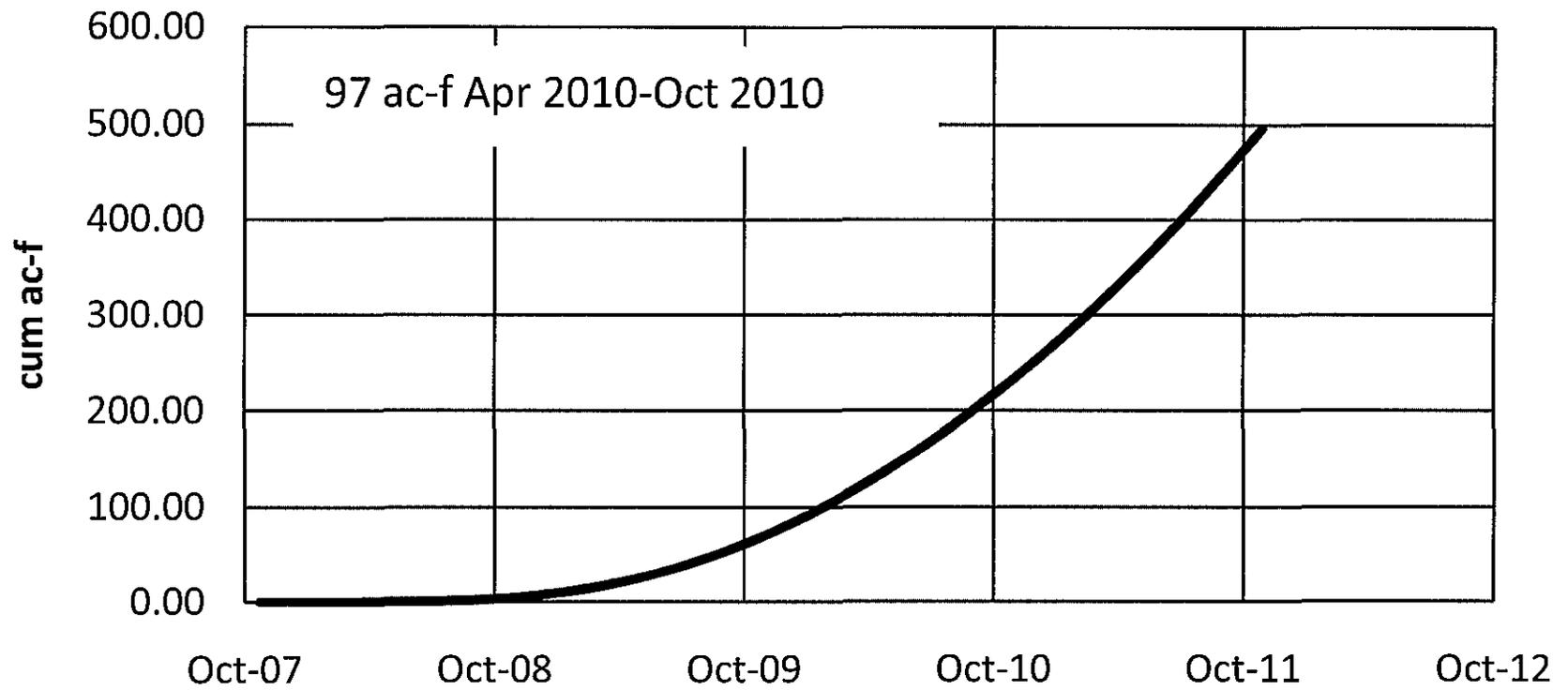
Deborah Gibson  
Administrative Assistant, IDWR

# ATTACHMENT A

# CREP nB\_Min



# Recharge - nB\_Min



# Conversion - nB\_Min

